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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

vs.

BRUCE A. MACKEY, Individually, and
TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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No.

SEARS, ROEBUCK AND CO., a New York corporation,
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vs.

BRUCE A. MACKEY, Individually, and
TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case denying Petitioner's motion to dismiss Respondents' appeal.

OPINIONS BELOW.

The memorandum opinion of the District Court is unreported and appears at page 22 of the printed Record filed contemporaneously herewith. The opinion of the United States Court of Appeals is not yet reported and is printed in Appendix A hereto, *infra*, page 2a.

JURISDICTION.

The order of the Court of Appeals was entered on January 18, 1955, Appendix A, page 10a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

The following questions are presented:

(1) When more than one claim for relief is presented in an action, does the dismissal of some but not all of the claims by a district court judge with an express determination that a final order is being entered and that there is no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, automatically and conclusively create a final appealable order conferring immediate jurisdiction in the court of appeals?

(2) If Rule 54(b) is thus automatically construed so as to confer appellate jurisdiction whenever a district court judge so decides irrespective of whether under prior law such jurisdiction existed, does the Rule go beyond the rule-making powers of the United States Supreme Court in that it expands the jurisdiction of appellate courts fixed by Section 1291 of Title 28 of the United States Code?

RULE AND STATUTES INVOLVED.

The rule and statutory provisions involved are Rule 54(b) of the Federal Rules of Civil Procedure, as amended, 28 U.S.C.A. Rule 54(b); Section 1291 of "Judiciary and Judicial Procedure", 28 U.S.C.A. Sec. 1291; and Section 2071 of "Judiciary and Judicial Procedure", 28 U.S.C.A. Sec. 2071. The statutes are printed in Appendix B, *infra*, page 11a. Rule 54(b) reads as follows:

"**Judgment Upon Multiple Claims.** When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

STATEMENT.

A six-count complaint was filed against Sears, Roebuck and Co., a New York corporation, on May 21, 1953, by Bruce A. Mackey, a resident of Illinois, and Time Saver Tools, Inc., an Illinois corporation. Bruce A. Mackey is the sole stockholder of Time Saver Tools, Inc. The jurisdiction of the District Court was invoked as to certain counts because of alleged violations of certain of the federal anti-trust laws and the patent laws. As to the common law counts, jurisdiction was invoked under 28 U.S.C. Sec. 1332, the amount in controversy being in excess of $3,000 and plaintiffs and defendant being of diverse citizenship. (R. 3, 9). In essence, the complaint alleged that defendant had over a period of years engaged in a planned course of conduct designed to drive Mackey out of any and all business ventures he engaged in, evidenced by some half-dozen allegations of overt conduct. By realleging these allegations singly and in combination, plaintiffs purported to state a variety of causes of action including violations of the Sherman

Act, the Clayton Act, the Robinson-Patman Act, common law unfair competition and patent infringement. On defendant's amended motion to dismiss all of the complaint except Count III thereof, the District Court dismissed Counts I, II and parts of Count VI without leave to amend and struck Count IV with leave to amend. Plaintiffs abandoned Count V. Count I embraced the anti-trust law theories of liability and Count II covered a claim of unfair competition based upon one phase of alleged overt conduct. As to those portions of the complaint struck without leave to amend, the District Court found, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, that there was no just reason for delay and expressly directed the entry of final judgment as to the dismissal of Counts I and II and parts of Count VI. (R. 36). Plaintiffs have filed an amended Count IV to which defendant has answered and the parties hereto are now at issue in the District Court on Count III, amended Count IV and that part of Count VI not struck.

Thereafter, on June 8, 1954, plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit from that part of the order of the District Court dismissing portions of their complaint without leave to amend. (R. 38). On November 15, 1954, defendant filed a motion to dismiss the appeal upon the ground that no final appealable order had been entered meeting the requirements of 28 U.S.C. Sec. 1291. (Appendix A, *infra*, page 1a). On January 18, 1955, the Court of Appeals denied defendant's motion to dismiss the appeal for lack of appellate jurisdiction upon the sole ground that the finding of the District Court as to finality under Rule 54(b) conclusively and automatically conferred jurisdiction upon the Court of Appeals, the Court concluding,

> "In view of our decision it is not necessary to decide the point much discussed in the briefs as to

whether the order and judgment entered herein would have been final and appealable prior to the 1948 amendment of Rule 54(b)." (Appendix A, *infra*, page 9a).

REASONS FOR GRANTING THE WRIT.

1. The Conflict Among and Within the Circuits.

The decision of the court below in this case is in direct conflict with decisions of the Second[1] and District of Columbia[2] Circuit Courts of Appeals; it agrees with decisions of the Third[3] and First[4] Circuit Courts of Appeals. In the Second Circuit, a conflict which has been given full expression by Judges Learned Hand, Clark and Frank in three different cases,[5] has raged[6] between two

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[1] **Flegenheimer v. General Mills, 191 F. 2d 237 (C.A. 2).**

[2] **Gold Seal Co. v. Weeks, 209 F. 2d 802, 810 (D. of C., C.A.).**

[3] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267 (C.A. 3);** this case has recently been annotated in 38 ALR 2d 356 under the heading, "Operation and effect of Federal Civil Procedure Rule 54(b) and similar state rules governing entry of judgment on multiple claims."

[4] **Boston Medical Supply Co. v. Lea & Febiger, 195 F. 2d 853 (C.A. 1); Francis v. Crafts, 203 F. 2d 809 (C.A. 1).**

[5] **Pabellon v. Grace Line, 191 F. 2d 169 (C.A. 2); Flegenheimer v. General Mills, 191 F. 2d 237 (C.A. 2); Lopinsky v. Hertz Drive-UR-Self Systems, Inc., 194 F. 2d 422 (C.A. 2).**

[6] The word "raged" is used advisedly as indicated by the following statement from the concurring opinion in the Third Circuit with respect to the conflict which this issue has engendered:

> "* * * The view to which we are persuaded has recently been elaborated in opinions expressing the thinking of a majority of the judges of the Court of Appeals for the Second Circuit. Their reasoning considered, we are not sure that we can shed additional light upon the problem; but we are sure that in the effort and in the exposition of our minority views here, we can and shall avoid the heat generated elsewhere in connection with minority views on the other side of this question." **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 277.**

panels of the Court. In the Third Circuit, a panel of that Court first decided the question in accordance with the views of the majority in the Second Circuit but that opinion was withdrawn and the Court, sitting *en banc*, reversed itself with two judges disagreeing on the point involved in a special concurring opinion.[7] The court below has detailed the conflict in its opinion (Appendix A, *infra*, page 4a) and concluded:

> "It would seem that the Supreme Court should promptly decide the important question here at issue in order to reconcile the divergent and conflicting views which have developed among and within the circuits. The question is constantly recurring. An early decision by the Supreme Court would be most helpful."[8]

Judge Learned Hand in his opinion dealing with the same problem but reaching the opposite result also concluded:

> "No doubt the answer is not as clear as one might wish; else the courts would not be so at odds as they are. In the end, the Supreme Court will no doubt have to pass upon it; meanwhile, we can only follow what light we have."[9]

The position taken by the court below in this case is that in a multi-cause action when the district court judge

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[7] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267 (C.A. 3).**

"On the first hearing, the Third Circuit held that the order in question lacked finality for purpose of appeal: it was not final under prior law; and amended 54(b) should not be construed as authorizing a district court by certificate to make an order final that would not have been under prior law. * * * This opinion was withdrawn and a rehearing held en banc. The withdrawn opinion now appears in substance as the concurring opinion of Judges Hastie and Kalodner." 6 Moore's Federal Practice, page 222, footnote 16 (Rev. Ed., 1953).

[8] **Appendix A, infra, page 7a.**

[9] **Flegenheimer v. General Mills, 191 F. 2d 237, 241 (C.A. 2).**

enters an order as to one or more but less than all of the claims and invokes "• • • the talismanic language prescribed by Section 54(b) • • •,"[10] a final, appealable order is automatically and conclusively created conferring immediate appellate jurisdiction which cannot be questioned by the courts of appeals.

The opposing view taken in the Second and District of Columbia Circuits is that the finding of a district court judge cannot be given this conclusive effect and that the courts of appeals must make their own independent determination in the light of the decided cases as to whether a final order has in fact been entered and as to whether they therefore do or do not have appellate jurisdiction. Under this view it is argued that had the Supreme Court intended the "strange anomaly"[11] of having district court judges determine the jurisdiction of the courts of appeals, it would have expressed itself directly and not have relied upon an oblique construction of language of negation contained in a rule of district court procedure. It is argued further that if the Supreme Court did intend this result, then the Supreme Court may well have exceeded its rule-making powers by extending the boundaries of appellate jurisdiction laid down in Section 1291 of Title 28 of the United States Code.[12]

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[10] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 277 (C.A. 3), Appendix C, infra, page 13a.**

[11] **Flegenheimer v. General Mills, 191 F. 2d 237, 241 (C.A. 2).**

[12] **Pabellon v. Grace Line, 191 F. 2d 169, 176 (C.A. 2, concurring opinion); Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 281 (C.A. 3, concurring opinion), Appendix C, infra, page 20a.**

2. The Importance of the Questions Involved.

Probably the best evidence of the importance of the jurisdictional issue raised in this case is the serious conflict which has developed among and within the courts of appeals and the many lengthy majority and dissenting opinions which have been written analyzing it in great detail. Under rules permitting liberal joinder of causes of action and parties, a resolution of the issue is of paramount importance in determining at what point in trial proceedings there is appellate jurisdiction to review orders of the district courts. Of equal or greater importance is the possibility that the interpretation given Rule 54(b) by the court below in this case and by the First and Third Circuits may be one which renders the Rule invalid as expanding the boundaries of appellate jurisdiction set by Congress in 28 U.S.C. Sec. 1291. Since the conflict has developed over the proper interpretation to be given to a Rule promulgated by the Supreme Court, it is peculiarly within the province of the Supreme Court to elucidate what it intended the effect of the Rule to be.

3. The Decision of the Court Below Is Believed to Be Erroneous.

In the light of the detailed opinions written by distinguished judges giving their reasons for believing that the interpretation of Rule 54(b) followed by the court below in this case is erroneous, it would be superfluous to attempt to add anything at this time. Perhaps the fullest exposition of the arguments against the decision of the court below in this case is contained in the special concurring opinion of Judge Hastie in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 277 (C.A. 3), and, for this reason, the opinion is reproduced in full, *infra*, page 12a. (Appendix C). Judge Learned Hand's analysis is to be

found in *Flegenheimer* v. *General Mills*, 191 F. 2d 237 (C.A. 2). Judge Frank's analysis is to be found in his concurring opinion in *Pabellon* v. *Grace Line*, 191 F. 2d 169, 176 (C.A. 2). It is humbly submitted that views expressed by these judges are correct and that the decision of the court below in this case is erroneous.

4. The Interlocutory Nature of the Order Entered By the Court of Appeals in This Case Has Little Bearing Upon The Granting of This Petition For Writ of Certiorari.

There can be no question that under the certiorari jurisdiction of the Supreme Court to grant petitions for certiorari either "before or after rendition of judgment or decree",[13] the within petition can be granted. As this Court has stated, it is not a question of power but of propriety.[14] The Supreme Court has not hesitated in the past to grant petitions for writ of certiorari from interlocutory decrees or orders where the importance of the question and conflict among the courts of appeals have warranted it.[15] Specifically, it has granted certiorari to review interlocutory orders where important questions of federal procedure have been involved.[16]

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[13] 28 U.S.C. Sec. 1254(1).

[14] **Forsyth v. Hammond, 166 U.S. 506.**

[15] **American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U.S. 372. (Cert. granted to test the validity of an interlocutory decree affirmed in the Circuit Court where trial judge sat on the appeals court). Land v. Dollar, 330 U. S. 731. (Cert. granted to review order of court of appeals reversing and remanding a case to district court after district court had dismissed complaint for lack of jurisdiction). Stack v. Boyle, 342 U. S. 1. (Cert. granted to review Circuit Court's affirmance of district court order denying a motion to reduce bail).**

[16] **Hickman v. Taylor, 329 U. S. 495. (Cert. granted to determine scope of pre-trial discovery under Federal Rules of Civil Procedure). Sibbach v. Wilson & Co., 312 U.S. 1. (Cert. granted to determine the validity of Rules 35 and 37 of the Federal Rules of Civil Procedure).**

Of primary importance is the fact that if this petition is not entertained at this time it will almost certainly not come up again. The motion to dismiss the appeal made by petitioner in the court below was made in compliance with a rule of the Seventh Circuit which specifically provides for the raising of jurisdictional issues on preliminary motion.[17] If certiorari is not granted now and the Court of Appeals affirms the decision of the District Court on the merits in dismissing portions of the complaint, plaintiffs who took the appeal will certainly not be in a position to urge in the Supreme Court that the Court of Appeals lacked appellate jurisdiction. If the Court of Appeals reverses the District Court and remands the case for trial such an order will be no less interlocutory than the one just entered by this Court, and, as a practical matter, defendant would be unlikely to petition for certiorari on the jurisdictional point after the Court of Appeals' views on the merits had been made known. If the case comes up again after final adjudication by the trial court, then the entire jurisdictional point based upon questions of finality of intermediate orders will be moot. Thus, if the question of appellate jurisdiction under Rule 54(b) is ever going to be resolved by the Supreme Court it must be brought before it at precisely the stage at which these proceedings now are. The ruling and opinion of the court below squarely raise the issue over which the various courts of appeals have differed. Until the Supreme Court resolves the issue, the confusion and conflict over the proper scope of Rule 54(b) can only get worse.

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[17] "Whenever it appears that there is a substantial jurisdictional question in a cause pending on appeal, such question may be raised by either party by motion, filed in accordance with Rule 19, to determine the issue as to jurisdiction in advance of hearing on the merits. * * *" Rule 18(b) of the Rules of the United States Court of Appeals for the Seventh Circuit.

CONCLUSION.

It is submitted that in view of the importance of the questions raised here with respect to federal appellate jurisdiction, in view of the serious conflict that has developed among the courts of appeals and in view of the fact that this is the most desirable stage and, indeed, probably the only stage of the proceedings at which the issue can be presented to the Supreme Court for decision, this petition for writ of certiorari should be granted.

Respectfully submitted,

LEO H. ARNSTEIN,
HERBERT E. RUBEN,
FRANK H. MARKS,
Counsel for Petitioner.

February 23, 1955.

APPENDIX A.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11225

BRUCE A. MACKEY,
Plaintiff-Appellant,

vs.

SEARS, ROEBUCK & CO., a New York corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
Julius J. Hoffman,
Judge Presiding.

MOTION

Now Comes Defendant-Appellee, Sears, Roebuck & Co., a corporation, by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court as follows:

(1) To dismiss the appeal taken herein for lack of a final and appealable order meeting the requirements of Title 28 U.S.C.A. Sec. 1291.

(2) In the event that this Court should not grant Paragraph (1) of this Motion, to extend the time for Appellee to file its Brief on this appeal to thirty (30) days after the Order of Court is entered denying Paragraph (1) of this Motion.

(3) In any event, to postpone oral argument on the within appeal until the January, 1955, Session of this Court.

In support of this Motion, the attached Memorandum of Law and Affidavit are made a part hereof.

.....
Leo H. Arnstein

.....
Herbert E. Ruben
Attorneys for Sears, Roebuck & Co.,
Defendant-Appellee.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11225. OCTOBER TERM, JANUARY SESSION, 1955.

BRUCE A. MACKEY, Individually and TIME SAVER TOOLS, INC., an Illinois corporation,
Plaintiffs-Appellants,
vs.
SEARS, ROEBUCK AND CO., a New York corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 18, 1955.

Before DUFFY, *Chief Judge*, MAJOR and SWAIM, *Circuit Judges.*

DUFFY, *Chief Judge.* The complaint herein containing six counts was filed by two plaintiffs, Bruce A. Mackey, an individual, and Time Saver Tools, Inc., a corporation, which was wholly owned by Mackey. They will hereinafter be referred to as plaintiff. The complaint alleged that since 1949 Sears had directed a course of predatory conduct successively at three business ventured carried on by plaintiff: (1) by localized price-cutting, it destroyed his lamp business; (2) by use of threatened boycott, induced a breach of plaintiff's contract for commissions with "Vascoloy", and (3) is attempting to destroy his tool business by means of unfair competition.

Count 1 alleges a deliberate and announced plan by Sears to destroy plaintiff's business activities, and that such a plan is violative of the Sherman Act and § 3 of the Robinson-Patman Act. In this count, plaintiff seeks treble damages and equitable relief under the Clayton Act. Counts 2, 3 and 4 are common law counts. In count 2 plaintiff seeks damages for the intentional destruction of his lamp business. In count 3 plaintiff seeks damages for defendant's inducement of the breach of his commission contract with "Vascoloy". In count 4 plaintiff seeks damages for unfair competition. Count 5 was a claim by Time Saver under § 2(f) of the Robinson-Patman Act. However, this count was abandoned by plaintiff after the decision by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61. Count 6 alleges defendant's entire predatory program was actionable under common law.

Defendant moved to dismiss the entire complaint. Later, defendant filed an answer to count 3 together with an amended motion to dismiss the balance of the complaint. The District Court ordered counts 1 and 2 to be stricken without leave to amend, and found that there was no just reason for delaying the final determination of the issues raised by these counts, and directed that judgment be entered thereon against plaintiff. The Court also struck count 4 but granted plaintiff leave to amend, which was done, and this count is now at issue. The Court struck all of the allegations of count 6 except the portion which realleged the facts covered by Count 3.

Plaintiff appeals from the order and judgment dismissing portions of the complaint without leave to amend. The appeal, in effect, challenges the holding of the District Court that the facts alleged in Counts 1 and 2 do not state, and could not be amended to state, a claim upon which relief can be granted.

Defendant moved to dismiss the appeal on the ground that the order and judgment appealed from is not a final or appealable order under the requirements of § 1291, Title 28, U. S. Code. This section provides: "The courts

of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *" Certain exceptions to this rule provided in § 1292 are not here applicable.

Because of the importance of the questions raised by the motion to dismiss the appeal, we set the motion down for oral argument after briefs had been submitted. In deciding whether the District Court entered a final decision, we must interpret Rule 54(b), Federal Rules of Civil Procedure.

Prior to September 1, 1938, the effective date of the Federal Rules of Civil Procedure, the order in this case would not have been appealable, because it did not dispose of all of Mackey's claims against Sears, *Collins* v. *Miller*, 252 U. S. 364. As originally adopted, Rule 54(b) authorized the entry on one claim in a multiple claim suit, when the issues material to that claim and all counterclaims arising out of the same transaction or occurrence, had been determined. The validity of the rule in its original form was upheld in *Reeves* v. *Beardall*, 316 U. S. 283.

Amended Rule 54(b) provides: "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

A conflict has arisen among the various courts of appeals as to the effect to be given to this rule. We find the First and Third Circuits lined up on one side holding generally that where an order has been entered by a district

court judge, where, as was done in the case at bar, he makes a "determination",[1] jurisdiction is automatically and conclusively conferred upon the courts of appeals to hear the appeal. However, the Second Circuit and the Court of Appeals of the District of Columbia have reached a contrary conclusion, holding, in effect, that the courts of appeals are required to make an independent determination as to whether the order in question was, in fact, a final order. This Circuit has not previously passed directly on the question, although there was discussion of the effect of the amended rule in *Winsor* v. *Daumit,* 179 F. 2d 475.

The first case to discuss the proper interpretation to be given to Rule 54(b) as amended was *Pabellon* v. *Grace Line, Inc.,* 2 Cir., 191 F. 2d 169. The panel considering this case was Judges Chase, Clark and Frank, Judge Clark writing the opinion for the Court. It was held that an order dismissing a third party complaint was an appealable order where the district court had complied with the requirements of Rule 54(b). The Court agreed that the appeal taken in that case would have been proper even prior to the amendment of Rule 54(b), but Judge Clark stated that the district court, by making a determination that there was no just cause for delay and that he was entering a final order under Rule 54(b) relieved the Court of Appeals from the task of making an independent analysis to determine whether or not the order was, in fact, final and appealable. Judge Frank, in a concurring opinion, took issue with Judge Clark's interpretation of Rule 54(b) stating that such an interpretation would render the rule invalid as beyond the statutory power of the Supreme Court.

Eight days after the decision of the Second Circuit in the *Pabellon* case, another panel of that court consisting of Judges Swan, Augustus Hand and Learned Hand, in *Flegenheimer* v. *General Mills,* 191 F. 2d 237, held in accordance with the view previously expressed by Judge

[1] The term "determination" includes "the express determination that there is no just reason for delay" and also the "express direction for the entry of judgment."

Frank in the *Pabellon* case. The Court held that no appealable order had been entered, and decided that it was the duty of the appellate court to determine its own jurisdiction and that such jurisdiction could not be controlled by the finding of a district court judge. Thereafter, in *Lopinsky* v. *Hertz Drive-UR-Self Systems, Inc.*, 194 F. 2d 422, Judge Clark vigorously defended the view that he had previously expressed in the *Pabellon* case.

The same question came before the Court of Appeals of the Third Circuit in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267. In that case a counterclaim was dismissed and the District Court made the requisite "determination" under Rule 54(b) that there was no just reason for delay and that final judgment be entered. The case was finally heard before the entire court sitting *en banc*, and it was held, with two judges dissenting, that the effect of Rule 54(b) was to render conclusive insofar as the jurisdiction of the court of appeals was concerned, the finding of the district judge that a final appealable order was being entered. Shortly thereafter the Court of Appeals for the First Circuit, in *Boston Medical Supply Co.* v. *Lea & Febiger*, 195 F. 2d 853, in an opinion by Chief Judge Magruder, stated that the First Circuit was in full agreement with the opinion of the Third Circuit in *Bendix Aviation Corp.* v. *Glass, supra.* More recently the Court of Appeals for the District of Columbia in *Gold Seal Co.* v. *Weeks*, 209 F. 2d 802, in an opinion by Chief Judge Stephens, followed the rule laid down by the Second Circuit in the *Flegenheimer* case.

Thus we find not only courts of appeals of two circuits opposing the view adopted by the courts of appeals of two other circuits, but we find panel opposed to panel in the Second Circuit and a vigorous dissent by two judges in the Third Circuit. Also, Professor Moore strongly espouses the views of Judge Clark insisting that such views properly reflect the intent of the draftsmen of the 1948 amendment to Rule 54(b). *Moore's Federal Practice*, (Second Edition, 1953), Vol. 6, pp. 228-230. It is of interest to note that Professor Moore was active in formulating and drafting the amended rule (*Pabellon* v. *Grace Line*,

Inc., 191 F. 2d 169, 173) and, of course, Judge Clark was the reporter of the Advisory Committee which recommended the amended rule to the Supreme Court.

It would seem that the Supreme Court should promptly decide the important question here at issue in order to reconcile the divergent and conflicting views which have developed among and within the circuits. The question is constantly recurring. An early decision by the Supreme Court would be most helpful.

The Second and District of Columbia Circuits have adopted a negative approach in interpreting the rule. They say that if, in a multiple claim suit, a trial judge fails to enter a "determination", then, although otherwise the order would have been appealable under § 1291 it remains interlocutory and non-appealable; that thus interpreted the rule does not alter the jurisdiction of the appellate courts as fixed in §§ 1291 and 1292. They argue further that the jurisdiction of a court of appeals cannot rest on a district court's decision as to whether or not he will enter a "determination" described in Rule 54(b).

We think the interpretation announced by the First and Third Circuits is correct. We feel certain that such was the understanding of the Advisory Committee as so well stated by Judge Clark and Professor Moore. We find ourselves in agreement with the following statement in the opinion of the *Bendix Aviation Corp.* case, 195 F. 2d 267, 269, 270: "* * * We read that rule, as embodied in amended Rule 54(b), to be that in a multiple claims case the judgment which finally adjudicates all the claims is the only judgment having finality unless the district court in the exercise of its discretion expressly determines that there is no just reason for delay with respect to the entry of a final judgment upon a particular claim in the action and accordingly expressly directs the entry of a final judgment adjudicating that claim. In such case the rule says that 'the court may direct the entry of a final judgment.' This is language of grant not of restriction and it requires that the judgment thus entered on a single claim is to be regarded as just as final, so far as further

revision by the district court is concerned, as though the claim thus adjudicated were the sole claim for relief embodied in a wholly independent action. For when such a judgment has been entered it may at once be enforced and executed, unless enforcement is stayed by the court under Rule 62(h)."

Section 1291 makes all final decisions appealable. The statute does not define the phrase "final decision". We have held that the new rules have the effect of statutes. *Winsor* v. *Daumit, supra,* p. 477. In that opinion we pointed out "* * * and if there is a conflict between a procedure provided in an earlier Act of Congress and that provided by the rules, the former must yield to the latter, * * * for the Act of Congress under which the rules were authorized expressly provided that, after they became effective, any laws in conflict therewith would no longer be of any force or effect."

We agree that in one sense the jurisdiction of a court of appeals is at least indirectly affected by an order or judgment with a "determination" under Rule 54(b). But, in a somewhat similar manner, our jurisdiction was often affected by Rule 73(a) whereby the time was shortened for taking an appeal, yet we had no difficulty in upholding and enforcing that rule. *Ray, et al.* v. *Morris, et al.,* 170 F. 2d 498.

In his concurring opinion in *Lopinsky,* 194 F. 2d at 428 Judge Clark refers to a number of the rules in the Federal Rules of Civil Procedure, while referring directly to district court practice, do have some consequential effect on when courts of appeal might consider the issues. As far as we are advised, the validity of these rules has not been questioned because of the effect on when a court of appeals may pass upon the issues. We have no difficulty in applying the positive approach in interpreting Rule 54(b).

In our judgment the negative operation of Rule 54(b) affects appellate jurisdiction just as much as the positive approach. In either case the district judge is timing his final decision on less than all of the claims in a multiple claim suit. Under either approach, the jurisdiction of the

court of appeals is indirectly affected. We think that the rule-making authority of the Supreme Court existed as to all procedural matters and activities in the district court even though they might consequently affect appellate jurisdiction.

Our decision herein, is in accord with our statement in *Winsor* v. *Daumit*, *supra* p. 478: "We think, also, that the rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the procedure of the district court as to conditions affecting terms upon which an appeal may be taken in advance of a determination of the entire case."

In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b).

The motion to dismiss the appeal is

DENIED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, January 18, 1955

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. J. Earl Major, Circuit Judge

Hon. H. Nathan Swaim, Circuit Judge

No. 11225

BRUCE A. MACKEY, Individually and TIME SAVER TOOLS, INC., An Illinois Corporation,

Plaintiffs-Appellants.

vs.

Sears, Roebuck and Co., a New York Corporation,

Defendant-Appellee.

Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

This matter comes before the Court on a motion to dismiss appeal, answer thereto, and memorandum briefs, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the Court that the motion to dismiss this appeal be, and the same is hereby, denied.

APPENDIX B.

STATUTES AND REGULATIONS INVOLVED

Rule 54(b) of the Federal Rules of Civil Procedure (28 U. S. C., Rule 54(b)) is set out in full in the text of this Petition, *supra*, at page 3.

Section 1291 of Title 28 of the United States Code entitled "'Judiciary and Judicial Procedure'' (62 Stat. 929, 28 U. S. C., § 1291) reads as follows:

> "**Final decisions of district courts.** The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 2071 of Title 28 of the United States Code entitled "Judiciary and Judicial Procedure" (63 Stat. 104, 28 U. S. C., § 2071) reads as follows:

> "**Rule-making power generally.** The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

APPENDIX C.

The following is the specially concurring opinion in full of Judges Hastie and Kalodner in *Bendix Aviation Corp. v. Glass*, 195 F. (2d) 267 (C. A. 3), commencing at page 277:

Judge Kalodner and I concur in the decision of the court that the judgment of the district court should be affirmed. However, we think that this court has jurisdiction of this appeal under Section 1292 (1) of Title 28, United States Code, not Section 1291 of Title 28 as the court holds.

Originally, this case was presented as an appeal under Section 1291 from a final decision of a district court. On rehearing it was urged, alternatively, that this is an appeal from an order which "refuses an injunction"; hence the order, if not a final decision, is nevertheless reviewable under Section 1292(1) which provides that an interlocutory order refusing an injunction is appealable to this court. In our opinion this alternative contention is sound. It enables us to agree that we have jurisdiction of this appeal. The court finds it unnecessary to consider this alternative basis of jurisdiction. We, however, must consider it since we think Section 1291 is inapplicable.

As concerns the present litigation, the enforced dismissal of plaintiff's claim, though without prejudice, was an effective denial of all relief for which plaintiff had asked. One of plaintiff's two specific prayers asked that defendant be restrained from dealing with an invention as his own property. In dismissing the claim the district court necessarily decided that plaintiff was not entitled to that relief. In recognition of that aspect of the order of dismissal this court in the concluding paragraph of its opinion states our reasons for believing that plaintiff is not entitled to an injunction in this suit. Thus, we have a case within the normal conception of appeal from an order re-

fusing an injunction as authorized by Section 1292(1) of Title 28.[1]

On the merits, Judge Maris speaks for us.

But despite our vote for affirmance, it seems to Judge Kalodner and me that the question of the effect of Rule 54(b) on our jurisdiction under Section 1291 is of such importance that we should state in some detail our reasons for disagreeing with the opinion of the court on this point. The view to which we are persuaded has recently been elaborated in opinions expressing the thinking of a majority of the judges of the Court of Appeals for the Second Circuit.[2] Their reasoning considered, we are not sure that we can shed additional light upon the problem; but we are sure that in the effort and in the exposition of our minority views here, we can and shall avoid the heat generated elsewhere in connection with minority views on the other side of this question.

At the outset, it is conceded that the majority give us a simple working rule for the entertaining of partial appeals in cases involving "multiple claims". Hereafter, in any such case, within this circuit at least, if a district court says its order is a final judgment and says it in the talismanic language prescribed by Section 54(b) of the Rules of Civil Procedure[3] the order is an appealable "final

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[1] General Electric Co. v. Marvel Rare Metals Co., 1932, 287 U.S. 430, 53 S. Ct. 202, 77 L.Ed. 408; Ward Baking Co. v. Weber Bros., 3 Cir., 1916, 230 F. 142; Drittel v. Friedman, 2 Cir., 1946, 154 F. 2d 653. Contrast the more limited effect of the order involved in Morgenstern Chemical Co. v. Schering Corp., 3 Cir., 1950, 181 F. 2d 160.

[2] The opinion of Judge Learned Hand, for himself, Chief Judge Swan and Judge Augustus Hand, in Flegenheimer v. General Mills, 2 Cir., 1951, 191 F. 2d 237, and the separate opinion of Judge Frank in Pabellon v. Grace Line, 2 Cir., 1951, 191 F. 2d 169, 176. The contrary views of Judges Chase and Clark appear in Judge Clark's opinion in Pabellon v. Grace Line, supra, and more recently have been elaborated in Judge Clark's separate opinion in Lopinsky v. Hertz Drive-Ur-Self Systems, 2 Cir., 1951, 194 F. 2d 422. Judge Medina did not sit in any of these cases.

[3] "Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. * * *"

decision" within the meaning of Section 1291. Nothing more need be considered. But simple and attractive as this end result is, we are unable to surmount the obstacles which beset the path our brethren have travelled.

We all agree, as our earlier decisions have stated,[4] that Section 1291 of Title 28 is the source of our appellate jurisdiction and that our problem here is whether a particular order of the district court is a "final decision" within the meaning of Section 1291. We also agree that until the adoption of the present Rule 54(b) the order here presented for review would not have been a final decision within the meaning of Section 1291. Now, however, by force of that Rule the court decides that Section 1291 embraces what it did not embrace before. The court rationalizes and minimizes the effect thus claimed for Rule 54 (b) by saying that the jurisdiction given this court by Section 1291 has not been altered but that the Rule has changed the impact of Section 1291. There has never been any more to the conception of final decision under Section 1291, it is argued, than a requirement that an order not be subject to revision by the trial court and that it be capable of immediate enforcement by execution or otherwise. All along the vice which made an order unappealable under Section 1291 was that actually, or in legal contemplation at least, the district court had not finished even with the part of the suit covered by the order. When Rule 54(b) provided procedure definitive of the completion of a portion of the litigation then, for the first time, such partial decision came to meet the unchanged standard of Section 1291.

We think this is too narrow a view of the meaning of Section 1291. It is true that one effect of the statute has been to preclude appeal where the order in question is subject to revision. But the statutory concept and its effect have been broader.[5] Generally, and we think correctly,

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[4] E. g., Cohen v. Globe Indemnity Co., 1941, 120 F. 2d 791; Canister Co. v. National Can Corp., 1947, 163 F. 2d 683.

[5] Catlin v. U. S., 1945, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911; Collins v. Miller, 1920, 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616; Ex parte National Enameling & Stamping Co., 1906, 201 U.S. 156, 26 S. Ct. 404, 50 L.Ed. 707; Hohorst v. Hamburg-American Packet Co., 1893, 148 U.S. 262, 13 S. Ct. 590, 37 L. Ed. 443.

Section 1291 has been thought to reflect a policy against the waste of time of appellate courts and against other evils inherent in the piecemeal presentation of related issues for review. It is obvious that multiple appeals in a single suit are likely to compel the reviewing court to go over much ground more than once. And even if this is avoided, there is the equally serious danger that on partial appeal issues may not appear as clearly or in the same perspective as when the whole litigation is reviewed. It was arguable as a matter of first impression that Section 1291 carried this policy so far that any appeal was precluded until the whole litigation was finished in the trial court.[6] But the Supreme Court in its construction of the statute occasionally found a portion of a law suit so distinct from the rest that the normal dangers of partial appeal were not present; where both in logic and in terms of the policy of Section 1291 that portion of the litigation might be reviewed as if it were a separate law suit. But these exceptions were few. And they were recognized cautiously in cases where the result seemed clearly consistent with the fundamental policy of Section 1291.[7]

On the other hand, if there was one situation where the restrictive policy embodied in the statute clearly precluded partial appeal, it was the case where plaintiff's claim was opposed by defendant's "compulsory counterclaim".[8] The case before us is a prime example. The plaintiff's claim asserts rights of equitable character which he thinks he has against the defendant in relation to a particular invention as a result of certain acts and relationships of the parties. Defendant's counterclaim asserts his alleged rights of legal character against plaintiff in connection with the same invention and as a result of the same acts and relationships. Whether there may be particular bits of evi-

[6] Countervailing special considerations of policy have resulted in the allowance of appeal from specified interlocutory orders under Section 1292 of Title 28. They are not relevant to the present argument.

[7] Withenbury v. U. S., 1866, 5 Wall. 819, 18 L.Ed. 613; Hill v. Chicago & Evanston R. R. Co., 1891, 140 U.S. 52, 11 S. Ct. 690, 35 L.Ed. 331; United States v. River Rouge Improvement Co., 1926, 269 U.S. 411, 46 S.Ct. 144, 70 L.Ed. 339. Compare Dickinson v. Petroleum Conversion Corp., 1950, 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299.

[8] The terminology now used in Rule 13 of the Federal Rules of Civil Procedure, 28 U.S.C., to describe a situation long familiar in pleading.

dence relevant to the claim and not the counterclaim, or vice versa, does not appear but does not matter. Essentially the same circumstances are the factual basis of both claim and counterclaim. The likelihood of pointless redundancy in such separate appeals on claim and counterclaim arising out of the same transaction was clear. Therefore, whether the district court had finished with the claim or not was immaterial. For until the counterclaim also was decided, adjudication was not comprehensive enough to amount to final decision within the meaning of Section 1291.[9]

Thus, we differ with the majority in our view that it was the quantum of litigation covered by partial decision in the claim-compulsory counterclaim situation beyond any possible deficiency of procedure in connection with the matter decided which resulted in the rule of non-finality until both claim and counterclaim had been adjudicated.

This conception of final decision continued after the Rules of Civil Procedure were adopted in 1938. Rule 54 (b), as then enacted, recognized that an order disposing of a particular claim while a counterclaim "arising out of the [same] transaction" remained pending did not cover enough to constitute a final judgment. Such an order remained unappealable.[10]

At the same time, because more diverse matters could be brought together in one action under the new Rules than theretofore, the 1938 Rule 54(b) undertook to describe possible units of judicial action so distinct from the rest of the litigation as properly to be the subject of review before completion of the entire litigation. Appar-

[9] General Electric Co. v. Marvel Rare Metals Co., 1932, 287 U.S. 430, 53 S. Ct. 202, 77 L.Ed. 408; Winters v. Ethell, 1889, 132 U.S. 207, 10 S.Ct. 56, 33 L.Ed. 339; Ayres v. Carver, 1854, 17 How. 591, 15 L.Ed. 179. And see references to this antecedent doctrine in cases cited in note 10, infra.

[10] Nachtman v. Crucible Steel Co., 3 Cir., 1948, 165 F.2d 997; Eastern Transport Co. v. U. S., 2 Cir., 1947, 159 F.2d 349; Toomey v. Toomey, 1945, 80 U.S. App. D.C. 77, 149 F.2d 19. Accord: Coffman v. Federal Laboratories Inc., 3 Cir., 1948, 171 F.2d 94. Cf. Cohen v. Globe Indemnity Co., 3 Cir., 1941, 120 F.2d 791.

ently it was the intention of the draftsmen to respect the conceptions underlying adjudications which had defined "final decision" in the administration of Section 1291 before the liberalization of joinder.[11] For although language of the Supreme Court not essential to the disposition of issues before the court at times had suggested that any partial disposition of an action lacked the coverage contemplated by Section 1291,[12] actual adjudication before 1938 had recognized, as we already have indicated, the appealability of certain obviously integral portions of an action less than the entire litigation. It is not surprising, therefore, that after the adoption of the original Rule 54(b) the Supreme Court explicitly recognized "* * * a judgment * * * which terminates the action with respect to such a claim [including any compulsory counterclaim] * * * is final for purposes of appeal under § 128 [now Section 1291] of the Judicial Code".[13] Since this case, *Reeves* v. *Beardall,* is thought by the majority to lend support to their position, it seems desirable to state explicitly that it does not overrule any earlier decisions of the Court on the nature of final decision. Rather, in a situation which it had not considered before, the Supreme Court applied a conception of an appealable unit of litigation which was consistent both with the rationale of its earlier decisions construing Section 1291 and with the Rules newly enacted in connection with the liberalization of joinder. In contrast, the present case discloses an old and familiar situation of claim and counterclaim with reference to the same transaction. Within this quantum of litigation disposition of less than all of the closely related opposing requests for judicial action has not heretofore constituted final decision under Section 1291; and if it does so now the meaning of Section 1291 in relation to old and familiar subject matter has been changed.

The present Rule 54(b) is an entire re-draft adopted in 1948. It undertakes a new approach to finality in the dis-

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[11] See Moore, Judicial Code Commentary (1949) 510-11.

[12] E. g., Collins v. Miller, 1920, 252 U.S. 364, 370, 40 S.Ct. 347, 64 L.Ed. 616.

[13] Reeves v. Beardall, 1942, 316 U.S. 283, 285, 62 S.Ct. 1085, 1087, 86 L.Ed. 1478.

position of one of several claims presented in an action. An express special finding that "there is no * * * reason for delay" in the entry of judgment and "an express direction for the entry of judgment" by the district court are required as the hallmarks which must appear before an order which disposes of less than all of the claims in suit can be a final judgment. An obvious purpose of this new requirement is to provide such measure of certainty concerning appealability as is afforded by assurance that without these findings a partial disposition of a law suit is on its face incomplete and will not be appealable.[14]

The court reasons that there is no significant distinction between this negative effect—which all of us concede—of a district court's failure to comply with Rule 54(b) in postponing any Section 1291 final decision and the affirmative effect of converting into a Section 1291 final decision an order the Supreme Court has said is not of that character. In this same connection the court points out that every day district courts necessarily accelerate or postpone final decisions by promptness or delay in entering judgment upon trial findings and opinions. But this very example illustrates just the distinction which we already have stressed. When we speak of such procedural steps as postponing or accelerating final decision, it is our unspoken premise that, procedure apart, the adjudication covers such subject matter as is comprehended by the phrase "final decision" in Section 1291. In other words, two things are necessary for such a final decision. The district court must take all the steps necessary to complete its action with reference to the claim and, in addition, the subject matter litigated must have scope enough to satisfy the statutory conception of final decision.

Thus, the court's analysis of Rule 54(b) as procedural in the sense of changing the time when an order is appealable is beside the mark. Litigated cases characteristically involve numerous challenged rulings made before final decision, however defined. To call any such ruling itself

[14] Lyman v. Remington Rand, Inc., 2 Cir., 1951, 188 F.2d 306; David v. District of Columbia, 1950, 88 U.S. App. D.C. 92, 187 F.2d 204; Winsor v. Daumit, 7 Cir., 1950, 179 F.2d 475.

a final decision within the meaning of Section 1291 would, of course, change the time of appeal. But in this case it would also change the quantitative conception under which final decision must include disposition of both claim and compulsory counterclaim, whether by one order or two, and whether the orders, if two, are entered simultaneously or at different times. This distinct and additional effect which the court now gives to Rule 54(b) involves serious difficulties which, as we see it, the proponents of the majority view do not resolve.

It is at least a novel conception of judicial power which enables a court of first instance in its discretion from case to case to determine whether its orders are sufficiently inclusive to be of appealable character. The conception is the more remarkable in this case because it involves authority to change the meaning of a statute at will and in the process to ignore the Supreme Court's prior construction of that statute. Whether district courts of the United States organized and authorized solely to exercise certain original jurisdiction comprehended within the judicial power of the United States under Article III of the Constitution can exercise such a function is at least unclear.

Moreover, this sport in judicial power would derive from a mere rule of district court procedure. The Supreme Court has pointed out that the enabling act[15] under which the present rules were adopted "was purposely restricted in its operation to matters of pleading and court practice and procedure" leaving undisturbed "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute".[16] It is true that the rules derive authoritative character from Supreme Court sanction. It is also true that in final analysis it is the Supreme Court which in the course of adjudication from case to case lays down the principles and precepts which give authoritative construction and systematic meaning to the statutory con-

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[15] 48 Stat. 1064 (1934).

[16] See Sibbach v. Wilson & Co., 1941, 312 U.S. 1, 10, 61 S.Ct. 422, 424, 85 L.Ed. 479; Cf., Mississippi Publishing Corp. v. Murphree, 1946, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185; Meek v. Centre County Banking Co., 1925, 268 U.S. 426, 45 S.Ct. 560, 69 L.Ed. 1028.

cept of appealable final decision. But it would be something else for the Court to undertake the alteration of this statutory concept of appealability through the promulgation of rules of district court procedure. Such a course would at least represent a departure from conventional and judicially approved notions of the nature and respective roles of legislation, adjudication and rule making.[17]

Although the opinion of the court does not analyze these difficulties, we think there is implicit recognition of their substantiality in the repeated denials by the draftsmen of the present Rules and the courts alike, including this court in this case, that the Rules generally or, 54(b) in particular, have any purpose or effect to enlarge judicial power or modify appellate jurisdiction.[18] This is a reasonable interpretation. It may well be a necessary one.[19] We would give it effect by refusing to read into Rule 54(b) the purpose or effect of empowering a district court to

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[17] Cf., Davidson Bros. Marble Co. v. U.S. ex rel. Gibson, 1909, 213 U.S. 10, 18-19, 29 S.Ct. 324, 53 L.Ed. 675; Hudson v. Parker, 1895, 156 U.S. 277, 284, 15 S.Ct. 450, 39 L.Ed. 424; both cited in support of the language of Sibbach v. Wilson & Co., supra, note 16. For the contrary view of a chief architect of the new rules, see Moore, Judicial Code Commentary (1949) 516-17.

[18] See Audi Vision, Inc., v. R.C.A. Mfg. Co., 2 Cir., 1943, 136 F.2d 621, 624, 147 A.L.R. 574; Hunteman v. New Orleans Public Service, Inc., 5 Cir., 1941, 119 F.2d 465, 466; 3 Moore Federal Practice (1st ed. 1938) 3155. Particularly noteworthy is the note of the Advisory Committee on Rule 54(b), 28 U.S.C.A. Federal Rules of Civil Procedure, page 118, stating the draftsmen's conception that the "historic rule in the federal courts [which] has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments" should be retained "and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule". And with optimism concerning the results of their highly competent labors they add "This is afforded by amended Rule 54(b) which re-establishes an ancient policy with clarity and precision". Whether in the light of subsequent events this is an over-estimation of the potential of a few words however well chosen for the simple solution of such a problem as this or an under-estimation of the capacity of judges for obfuscation, it is significant of the limited effect intended for the new rule.

The note is further significant in its revelation that experience with the earlier form of Rule 54(b) had shown a tendency to employ the rule, contrary to its intention, to enlarge the field of appeals from partial judgments not final under precedent conceptions. The new rule was conceived restrictively to avoid this consequence of its predecessor.

[19] Flegenheimer v. General Mills, supra, note 2. This holding was anticipated by comments of Judge Frank in Clark v. Taylor, 2 Cir., 1947, 163 F.2d 940, 951 note 12.

make an order partially disposing of an action a final decision when it does not decide enough to meet the requirements of Section 1291 as authoritatively construed. This restrictive interpretation would leave unimpaired the usefulness of Rule 54(b) which derives from its above mentioned negative effect. The rule would be left to serve a very valuable purpose, and apparently its principal intended purpose. It would relieve litigants of the risk of losing their right of appeal which heretofore has resulted from failure to take an immediate appeal from a partial disposition of an action under the mistaken belief that the order was not a final decision. For now, regardless of what an order must comprehend to have the scope essential to finality under Section 1291, it would not meet the procedural requirements of Rule 54(b) unless the district court had formally directed the entry of judgment and unless the court had made explicit what would normally be implicit in any attempted partial final judgment; namely, that there was in the view of the trial court no reason of fairness or administrative convenience for retaining jurisdiction over this adjudicated segment of the litigation until the entire action could be adjudicated and its disposition viewed as a total picture.[20].

Finally, we have noted but do not share the fears of our brethren and others that our view, if adopted, would jeopardize many other sections of the new Rules. Without burdening this opinion with an elaborate catalog of rules, it seems to us that nothing is claimed for other rules which presents difficulties equivalent to those encountered when Rule 54(b) is given the effect claimed for it in this case. There is, of course, a normal and proper effect which many rules exert upon appeals as a necessary consequence of their regulation of procedure in the district court. Rule 54(b) is effective in the same way. It is only the questionable additional effect which we would avoid by our construction of the Rule.

[20] See cases cited in note 14, supra.

Summarizing our analysis of the matter in question, it seems to us that there is a quantitative conception of final decision, as distinguished from the new procedural steps and policy findings in the district court now prerequisite for the entry of finally dispositive partial judgment, for which we must continue to look to Section 1291 as authoritatively construed. A finding of a district court that no just cause exists for delaying partial judgment, such as was made in this case, does not of its own force and without regard to the coverage of the dispositive order make a "judgment" entered pursuant thereto appealable, whatever the considerations may have been which induced the district court's conclusion. At most such considerations might have effect in persuading the Supreme Court to reconstrue Section 1291 and recognize some hitherto unformulated exception to the present general rule against partial appeals. But it is not our function to declare such exception in a situation where neither the holdings nor the reasoning of the Court in construing Section 1291 seem to permit it.